

In the Matter of:

City of Alexandria
v.
Purdue Pharma

Hearing

January 18, 2019



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1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
3 (Alexandria Division)

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5 CITY OF ALEXANDRIA,

6 Plaintiff,

7 v.

Case No. 1:18cv1536

8 PURDUE PHARMA, et al,

9 Defendant.

10 -----

11 Alexandria, Virginia

12 January 18, 2019

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16 The above-entitled matter came on to be
17 heard before the HONORABLE CLAUDE M. HILTON, Judge
18 in and for the United States District Court for the
19 Eastern District of Virginia, located at 401
20 Courthouse Square, Alexandria, Virginia, commencing
21 at 10:24 a.m., when were present on behalf of the
22 respective parties:

1 A P P E A R A N C E S

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22 (Appearances continued on the following page.)

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1 P R O C E E D I N G S

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3 THE CLERK: Civil Action 2018-1536, City of
4 Alexandria versus UnitedHealth Group Incorporated,
5 et al.

6 Counsel, please note your appearance for
7 the record.

8 MR. SPIVEY: Your Honor, I'm Ed Spivey from
9 the firm of Kaufman Canoles, here on behalf of the
10 City of Alexandria.

11 THE COURT: All right. Good morning.

12 MR. CONRAD: Your Honor, Johan Conrad, also
13 from Kaufman Canoles, here on behalf of the City of
14 Alexandria.

15 MR. SHARP: Your Honor, Kevin Sharp with
16 the law firm of Sanford, Heisler, and Sharp. I'm
17 here on behalf of the City of Alexandria.

18 MR. MILLER: Good morning, Your Honor.
19 Andrew Miller from the law firm Sanford, Heisler,
20 and Sharp, also on behalf of the City of Alexandria.

21 MR. BROOKS: Good morning, Your Honor.
22 Ross Brooks, from Sanford, Heisler, and Sharp, on

1 behalf of City of Alexandria.

2 MR. MORRIS: Good morning, Your Honor.

3 Grant Morris on behalf of Sanford, Heisler, City of
4 Alexandria.

5 MR. BROUGHTON: Good morning, Your Honor.

6 Turner Broughton from Williams Mullen, here on
7 behalf of the Optium defendants and UnitedHealth.

8 MS. CHEMERINSKY: Good morning, Your Honor.

9 My name is Kim Chemerinsky at the law firm of Alston
10 & Bird, here on behalf of defendants Optium and
11 UnitedHealth Group.

12 MR. JORDAN: Good morning, Your Honor.

13 Bill Jordan, also from Alston & Bird, for Optium and
14 UnitedHealth Group.

15 MS. ROSADO: Good morning, Your Honor.

16 Roxanne Rosado on behalf of Express Scripts, Inc.,
17 and Express Holdings, Inc.

18 MR. MENCHEL: Good morning, Your Honor.

19 Matthew Menchel of Kobre & Kim on behalf of the
20 Express Scripts defendants.

21 MS. RIVIERE: Good morning, Your Honor.

22 Adriana Riviere, Kobre & Kim, on behalf of the

1 Express Scripts defendants.

2 MS. PARK: Good morning, Your Honor. My
3 name is Julian Park, on behalf of Express Scripts.

4 MR. MASSIE: May it please the Court, Wade
5 Massie on behalf of Purdue Pharma, LP, Purdue
6 Pharma, Inc., and Purdue Frederick Company. With me
7 is Mr. Cory Ward who has a motion pending pro hac
8 vice.

9 THE COURT: All right. That motion is
10 granted.

11 Do I have all parties now?

12 MR. MASSIE: Yes, sir.

13 THE COURT: All right. Whose motion is it?
14 Who wants to go first?

15 MR. BROUGHTON: Your Honor, there are
16 multiple -- this is Turner Broughton, Your Honor,
17 and I'm local counsel for Alston Bird. There are
18 multiple motions pending. There's a motion to
19 remand as well as a motion to stay, and so we would
20 be at Your Honor's pleasure in terms of what Your
21 Honor would like to hear first.

22 THE COURT: It doesn't matter. Whoever

1 wants to go first.

2 MR. CONRAD: Your Honor, from the
3 plaintiff's perspective, we think the order that
4 they were filed, the motion to remand was filed
5 first and the motion to stay was filed next; so I
6 think that's the natural order.

7 THE COURT: All right.

8 MR. CONRAD: If that's okay with you.

9 THE COURT: That's fine with me.

10 MR. CONRAD: Your Honor, may it please the
11 Court, I'm Johan Conrad. As I just said, I'm from
12 Kaufman & Canoles. I'm here on behalf of the City
13 of Alexandria and I'm going to address the motion to
14 remand.

15 Your Honor, there are three basic
16 categories of jurisdiction that are at issue in the
17 motion to remand, basically the categories of
18 jurisdiction that the defendants are relying on.
19 And so I'm going to address those essentially in
20 order in which they were addressed in the briefing
21 and try to go through them relatively succinctly.

22 As you know, Your Honor, this case was

1 first filed in the city -- excuse me, in Alexandria
2 Circuit Court on behalf of the City of Alexandria
3 against a number of defendants who are part of the
4 pharmaceutical opioid chain of distribution;
5 everything from the manufacturers of the opioids, to
6 the distributors of the opioids, to pharmaceutical
7 benefit managers who help work in the chain of
8 distribution to deliver those opioids to end users.

9 The counts in the claims in the complaint
10 filed by the City of Alexandria are all brought
11 under Virginia state law. They range from statutory
12 public nuisance claims, which are only available to
13 localities and government entities in the
14 Commonwealth of Virginia, to common-law negligence
15 claims to conspiracy claims. Every single claim --
16 Virginia Consumer Protection Act claim, they all
17 arise under Virginia law.

18 There are no federal claims in the
19 complaint. The complaint is lengthy, it contains
20 several hundred allegations. It contains
21 allegations against a number of defendants, at least
22 one of which is a Virginia resident defendant.

1 There's no dispute that there is not diversity as to
2 that defendant. And I'll talk about some issues
3 with that defendant -- with the defendants here in a
4 few minutes.

5 Your Honor, the -- the three bases on which
6 the removal has occurred, first is under something
7 called Class Action Fairness Act, CAFA. The second
8 is federal question jurisdiction under a -- what's
9 been deemed a special and small category of federal
10 question jurisdiction recognized in Supreme Court
11 cases like *Gunn v. Minton* and also addressed in the
12 Fourth Circuit in a case *Flying Pigs*.

13 The last category has to do with diversity
14 jurisdiction, and that involves a couple of prongs.
15 There's a piece of that in which there's an argument
16 for fraudulent joinder and then there's another
17 piece of that that argues for Rule 21 severance. So
18 with Your Honor's indulgence, I'm going to start
19 with the Class Action Fairness Act piece of this
20 case.

21 Before I do, I want to make clear that
22 there were some proceedings going on in the Virginia

1 state courts when this case was removed. As you may
2 know from some of the briefing, the plaintiffs had
3 petitioned the Supreme Court of Virginia under the
4 Multiple Claimant Litigation Act to consolidate
5 similar actions in one particular Circuit Court.

6 The Supreme Court of Virginia had already
7 issued an order appointing a three-judge panel of
8 three Circuit Court judges to hold a hearing and any
9 necessary briefing on the issue of consolidation,
10 and they were working to set a hearing. In fact,
11 there was an actual hearing date being -- being
12 circulated for -- for a possible hearing in January
13 at the time that these cases were removed or the
14 time this case was removed.

15 So, Your Honor, with respect to the Class
16 Action Fairness Act, there are actually two Fourth
17 Circuit opinions that provide clear guidance on this
18 issue within the Fourth Circuit. There is also a
19 Second Circuit opinion that provides somewhat less
20 clear guidance because it's not as relevant here in
21 the Fourth Circuit. And then there's actually a
22 district court opinion that has come directly out of

1 the opioid litigation context that addresses the
2 Class Action Fairness Act jurisdiction argument.
3 All of those decisions have rejected the application
4 of CAFA in a context like this one.

5 And I think that the most appropriate
6 decision or the most on-point decision for purposes
7 of this Court is the Fourth Circuit's decision in a
8 case called West Virginia v. CVS Pharmacy.

9 Now, remember, Judge, there are -- there
10 are two bases under the Class Action Fairness Act by
11 which Congress has deemed there could be -- there
12 could be federal question -- or excuse me, federal
13 jurisdiction. The first is under a class action,
14 second is under what they call a mass action. And
15 mass action involves we have multiple individual
16 cases, under 100 individual cases that are
17 consolidated. And so under that mass action, you
18 could have CAFA jurisdiction.

19 The only category that the defendants have
20 raised here is the class action category. They have
21 not -- they specifically decline to rely on the mass
22 action part. Okay.

1 So West Virginia v. CVS pharmacy is a
2 Fourth Circuit case that specifically deals with
3 class action jurisdiction in the context of a
4 lawsuit brought by a government entity, in that case
5 the Attorney General for the state of West Virginia.

6 The feature of class action jurisdiction or
7 CAFA that matters most for purposes of us here today
8 is that to have jurisdiction or CAFA, you either
9 have to file under Rule 23 of the Federal Rules of
10 Civil Procedure or you have to file under what is in
11 the statute called a similar statute -- state
12 statute or rule of judicial procedure authorizing an
13 action to be brought by one or more represented
14 persons as a class action.

15 So the threshold question here is whether
16 or not the complaint before you filed by the City of
17 Alexandria was brought under a similar state statute
18 or rule of judicial procedure similar to Rule 23.

19 And so in this West Virginia case, what the
20 Fourth Circuit said was, okay, what does it mean for
21 a state statute or rule of judicial procedure to be
22 similar to Federal Rule 23. And in that case the

1 Fourth Circuit said while a similar state statute or
2 rule does not need to contain all of the conditions
3 and administrative aspects of Rule 23, it must at a
4 minimum provide a procedure by which a member of a
5 class whose claim is typical of all members of the
6 class can bring the action not only on his own
7 behalf but also on behalf of all others in the class
8 such that it wouldn't be unfair to bind everyone to
9 the judgment that's entered.

10 And then the Fourth Circuit went on to
11 explain what that meant even more and to distinguish
12 the case in front of it in ways that I think are
13 directly applicable to this particular case. And
14 one of the things that the Fourth Circuit said was
15 the reason that the case brought by the state of
16 West Virginia could not be deemed a class action is
17 that for a representative suit to be a class action,
18 the representative party had to be a part of the
19 class and possess the same interest and suffer the
20 same injury as the class members.

21 And the Court said here -- and remember --
22 I should probably back up and set the stage a little

1 bit. The reasons the defendants argue that this
2 somehow looks like a class action is that they are
3 claiming that the damages are -- and the -- and the
4 claim is actually being brought on behalf of the
5 residents of the city of Alexandria as opposed to on
6 behalf of the city itself. And so somehow the
7 citizens of the city of Alexandria should be deemed,
8 quote-unquote, real parties in interest. Okay.

9 And so what the Fourth Circuit said is a
10 case like this can't be a class action because in
11 order to be -- in order to be similar to a class
12 action, the representative party has to be a part of
13 the class. In other words, it would have to
14 be another resident of the city. And in the West
15 Virginia case, the Fourth Circuit said the attorney
16 general's claim on behalf of the state of West
17 Virginia does not require the state to be a member
18 of the class, it does not require the state to
19 suffer the same injury as the class member or to
20 have a claim typical of each class member's claim.

21 So here the City of Alexandria is not a
22 member of the, quote-unquote, class that the

1 defendants would claim exists here. And the City of
2 Alexandria is not bringing this claim in a
3 representative capacity on behalf of the other or
4 the residents of the city.

5 Now, what the defendants have done is they
6 have tried to cherry pick certain allegations in the
7 complaint that reference generally injury to
8 particular residents and citizens. In other words,
9 there are some paragraphs in the complaint -- the
10 complaint is several hundred paragraphs long, but
11 there are a couple that talk about the fact that
12 some of the -- some of the residents have been
13 injured or been subject to bad acts by the
14 defendants.

15 What -- but the case is not brought
16 underneath any state statute or rule of judicial
17 procedure that looks like Rule 23. And, in fact,
18 the Commonwealth of Virginia does not even have a
19 state statute rule of judicial procedure that would
20 allow a representative class action. In fact, we
21 cited to the Supreme Court of Virginia case or
22 recent Supreme Court of Virginia case in our briefs

1 that specifically says Virginia does not recognize
2 these kinds of representative actions. So you can't
3 even bring in Virginia the kind of case that would
4 be similar to Rule 23 for purposes of CAFA
5 jurisdiction.

6 So there are a multitude of reasons why
7 this claim is not a class action under CAFA. It's
8 been rejected. The only time it's been addressed in
9 the Fourth Circuit with respect to government entity
10 plaintiffs, it's been rejected by a District Court
11 in the opioid context. It's been rejected by the
12 Second Circuit in another case that involved opioids
13 in the Commonwealth of Kentucky. So there's frankly
14 no basis for this Court to conclude that there is
15 any federal jurisdiction under the Class Action
16 Fairness Act.

17 So, Your Honor, unless you have any
18 questions about CAFA, I'm going to move on to the
19 next issue that was raised as a basis for federal
20 jurisdiction and that would be federal question
21 jurisdiction.

22 So federal question jurisdiction is -- the

1 only basis for the federal question jurisdiction
2 argument here is what's the been called a special
3 and small category of federal question jurisdiction.
4 And the Fourth Circuit has specifically provided
5 guidance with respect to this issue as well.

6 In a case called Flying Pigs, a very
7 colorfully named case, Flying Pigs, LLC v. RRAJ
8 Franchising, LLC, Fourth Circuit recognized that in
9 order to fit in this tiny, little area -- and what
10 it is is if you have state law claims but every
11 single piece of the state law claim would require
12 some resolution of a federal issue, and it would be
13 a significant, substantial federal issue for
14 purposes of the federal systems as a whole, it
15 wouldn't interfere with the federal state balance,
16 it would be actually in dispute. There's a -- there
17 are four specific elements to this test. And it's a
18 conjunctive test; in other words, every single
19 element has to be met.

20 Here's what the Fourth Circuit said about
21 what needs to happen in order to qualify for this
22 very narrow window of federal question jurisdiction.

1 This is quoting the Fourth Circuit, As we've
2 recognized the plaintiff's right to relief for a
3 given claim necessarily depends on a question of
4 federal law only when -- and this word is actually
5 emphasized in the opinion, it's underlined -- only
6 when every -- every legal theory supporting the
7 claim requires the resolution of a federal issue.

8 Now, the defendants have claimed that some
9 of the claims here involve resolution of a federal
10 issue, but the bottom line is that unless every
11 legal theory supporting the claim requires the
12 resolution of a federal issue, it doesn't qualify
13 for this jurisdiction. I mean, excuse me, yeah, for
14 this federal question jurisdiction loophole.

15 So we've got a public nuisance claim under
16 the -- under the -- under the state statute that
17 provides for public nuisance claims, we've got a
18 common law nuisance claim, we've got a common law
19 trespass claim, we've got conspiracy claims, all of
20 which can be and, in many cases, will be resolved
21 without reliance on any federal issue.

22 Now, the defendants have said, well, the --

1 the complaint cites to the Controlled Substances Act
2 and whether or not the defendants complied with
3 Controlled Substances Act, that's true. And there
4 may be an element of this case that involves
5 determining whether or not, for purposes of some of
6 these claims, the defendants violated or did not
7 violate the Controlled Substances Act.

8 But as I just said from the Fourth Circuit,
9 in order to qualify for this narrow window of
10 federal jurisdiction, every legal theory -- every --
11 the Fourth Circuit emphasized the word "every," --
12 every legal theory supporting the claim requires the
13 resolution of a federal issue. And it's beyond
14 doubt that not every legal theory here would require
15 a resolution of a federal issue.

16 In fact, as you know, Your Honor, in filing
17 cases in Virginia, you talk about the acts of the
18 defendant, say they acted negligently, you go to
19 trial, you put on the evidence of negligence. That
20 evidence of negligence may, under other
21 circumstances, violate something else, but you don't
22 have to mention that. You can present to the jury

1 the evidence that you have, the bad acts of the
2 defendants, and under Virginia common law you can
3 recover if the jury finds you to be negligent.

4 Count I is a statutory public nuisance
5 claim that only exists in -- under Virginia
6 statutory public nuisance law. The Count II, the
7 common law nuisance, negligence. All of these
8 things are intertwined with and require, for the
9 most part, resolution of only state law issues.

10 And remember it has to be every single
11 piece of our claim has to be founded upon a federal
12 issue -- requiring the resolution of federal issue
13 in order to meet this loophole. And that is simply
14 not the case. So there's no basis for federal
15 question jurisdiction here.

16 And let me point out real quick, Your
17 Honor, in the defendant's briefing, at one point
18 they -- they had said that, Well, if -- they
19 misstated this particular -- this particular legal
20 theory. And they said, Well, we've got some claims
21 that involve the resolution of a federal issue and,
22 therefore, that will be enough. Well, that's --

1 that's just not the case. The Fourth Circuit has
2 said it has to be every legal theory supporting the
3 claim. There are lots of state law theories
4 supporting the claims.

5 So, Your Honor, I'm going to move on to
6 diversity jurisdiction. The diversity jurisdiction
7 arguments here actually involve two different
8 theories. One is fraudulent joinder and the other
9 is Rule 21 severance. And if I will, Your Honor,
10 I'd like to sort of set the stage for you for this
11 argument.

12 So there's a nondiverse defendant in this
13 case. When the case was -- and this is a tangential
14 undisputed fact. When the case was removed, there
15 was actually a motion to amend and an amended
16 complaint sitting in the Alexandria Circuit Court
17 that the Court had not actually entered the order
18 yet on the amended complaint. The defendants
19 swooped in and removed it before the Court got the
20 order entered.

21 The amended complaint would have added
22 additional nondiverse defendants who also happened

1 to be distributor defendants; but as we sit here
2 today, we're working off the original complaint
3 because that's the complaint that was in effect at
4 the time of the removal because the order hadn't
5 been entered yet.

6 So we did have a nondiverse defendant in
7 the original complaint. It's an entity called
8 McKesson Medical. There's actually two distributor
9 defendants with the name McKesson in -- in the
10 complaint. McKesson Medical, no one disputes
11 McKesson Medical is a Virginia citizen for diversity
12 jurisdiction purposes and their presence would
13 destroy diversity jurisdiction.

14 The defendants, therefore, argue with
15 respect to fraudulent joinder. They claim that
16 there are not sufficient factual allegations in the
17 complaint to support relief against McKesson Medical
18 and, therefore, they have been fraudulently joined.
19 In a second, I'm going to show Your Honor exactly
20 why that -- that argument has no legs.

21 The second thing they do is that when a
22 fraudulent joinder argument is narrowly focused in

1 on McKesson Medical as a nondiverse defendant, for
2 Rule 21 severance, they broaden the scope to all
3 distributor defendants who are identified in the
4 complaint and they say that Your Honor should sever
5 the distributor defendants from the manufacturer
6 defendants all together. And once you sever all the
7 distributor defendants, you will then in that bucket
8 take with you the nondiverse defendant and,
9 therefore, it will preserve federal jurisdiction as
10 to the manufacturer defendants.

11 I think it's important to note out of the
12 box that there are multiple federal district courts
13 within the Fourth Circuit that have rejected both of
14 these arguments unequivocally. And, Your Honor, I'd
15 like to start with respect to the fraudulent joinder
16 argument, and actually the Rule 21 argument.

17 Judge Hendricks down in South Carolina
18 issued a couple of decisions, some of the other
19 South Carolina judges did too, and she had some
20 things to say about this. And she talked about the
21 fact that, as described in the filings in this
22 case -- and that case was another opioid case,

1 involved very similar allegations, involved many of
2 the same defendants. The prescription drug supply
3 system in the United States involves manufacturers,
4 or defendants here, distributors, or defendants
5 here, and other entities all of whom are involved at
6 one stage or another in one capacity or another in
7 delivering prescription drugs to patients. This
8 delivery of prescription drugs takes place within a
9 complex system that controls the price and flow of
10 drugs in America. It's supposed to be a closed
11 system.

12 In accordance with that, the laws and regs
13 that have been cited should be in place all along
14 the distribution chain to prevent prescription drugs
15 from being diverted anywhere other than the
16 legitimate channels.

17 All of these defendants are in that supply
18 chain. Based on the foregoing, the Court, Judge
19 Hendricks, finds the removing defendants have failed
20 to make a showing that these defendants were
21 fraudulently joined.

22 So, Your Honor, this argument, this

1 fraudulently joinder argument has already been
2 rejected in an opioid context and for good reason.

3 Your Honor, do you happen to have a copy of
4 the complaint up there with you? Because, if not, I
5 have a copy that I can hand up to you that I'd like
6 to --

7 THE COURT: You can just tell me what you
8 want to tell me.

9 MR. CONRAD: Okay. Well, Your Honor, what
10 I'd like to do very quickly is I just want to go
11 through -- there -- there have been multiple
12 statements in briefing and things that have said
13 that McKesson Medical, which is the Virginia
14 nondiverse defendant, that the complaint is devoid
15 of specific factual allegations against McKesson
16 Medical. And that's absolutely not the case.

17 And what I want to do is -- very quickly, I
18 want to run through the specific allegations of the
19 complaint. And we've cited these in our brief, but
20 I think it's important to show the Court exactly how
21 detailed some of the descriptions are in the
22 complaint about McKesson Medical.

1 So, first of all, the defendants have --
2 have tried to analogize this case -- this fraudulent
3 joinder part of the case to other cases outside the
4 opioid context where courts have said, Well, there
5 are really no specific allegations against this
6 particular defendant so clearly they were just
7 tacked on to destroy diversity and so, therefore,
8 they're fraudulently joined and we can ignore their
9 presence.

10 Now, Virginia courts, including this
11 district, have said, look, the only way that you can
12 show fraudulent joinder is if you can show that
13 there was no possibility of recovery against the
14 allegedly fraudulently joined defendant. No
15 possibility of recovery.

16 In fact, one court said in Virginia state
17 courts usually you just have to say negligence in
18 your claim, your pleading -- the notice pleading
19 standards. So as long as you've got some facially
20 valid allegation of negligence, which is a really,
21 really low bar in the Virginia pleading standard,
22 then the defendant is not fraudulently joined.

1 I suggest to you here that we have far and
2 away exceeded what was already a very low bar. So
3 if you imagine a high jump being set and we only had
4 to get a foot over, we jumped ten feet over. And
5 that's what I want to do, is go through and show you
6 that not only have we alleged a possibility of
7 recovery, we've alleged a very clear likelihood of
8 recovery.

9 First of all, unlike the cases that the
10 defendants have cited, the allegations against
11 McKesson Medical are not simply vague allegations
12 against all defendants. So the cases the defendants
13 want to rely on talk --

14 THE COURT: Tell me what allegations you've
15 made against them.

16 MR. CONRAD: Your Honor, there is a
17 subcategory of defendants called the distributor
18 defendants, they are alleged as such. Distributor
19 defendants are a particular category within the
20 complaint. So right above paragraph 92 in the
21 complaint, there is a subhead C in bold, all caps,
22 says distributor defendants. And then underneath

1 that through the following paragraphs 92 and
2 following, it identifies specific different
3 distributor defendants. So if you go underneath the
4 distributor defendants subhead to paragraphs 99
5 through 101, there's specific allegations about
6 McKesson Medical being a Virginia corporation and
7 being a wholesale distributor of pharmaceuticals,
8 including opioids.

9 You then flip through a few more paragraphs
10 after the other distributor defendants have been --
11 have been identified. Paragraph 111 of the
12 complaint then says, The distributor defendants
13 listed above -- which includes McKesson Medical,
14 there's four or five of them -- The distributor
15 defendants listed above are collectively referred to
16 herein as, and then it's quoted, distributor
17 defendants.

18 And then paragraph 112 says, The
19 distributor defendants, which includes McKesson
20 Medical, purchased opioids for manufacturers and
21 sold them to pharmacies throughout Virginia. The
22 distributor defendants, including McKesson Medical,

1 played an integral role in opioids being distributed
2 across Virginia, including Alexandria.

3 Paragraph 113, the failure of all
4 distributor defendants, including McKesson Medical,
5 to effectively monitor and report suspicious orders
6 of opioids and implement measures to prevent the
7 filling of invalid medically unnecessary
8 prescriptions greatly contributed to the increase in
9 opioid overuse and addiction. Distributor
10 defendants, including McKesson Medical, directly
11 caused a public health and law enforcement crisis
12 across the country, including in Alexandria. Those
13 are directly -- that's a direct quote from the
14 complaint.

15 You flip back further, paragraph 259 of the
16 complaint is -- there's a subhead right above
17 paragraph 259. It says, Manufacturer and
18 distributor defendants, which includes McKesson
19 Medical, violated the requirements to prevent
20 diversion and report suspicious orders under both
21 Virginia and federal law.

22 Paragraphs 259 -- and I won't read you

1 every one, but paragraphs 259 through 266 then lay
2 out specific allegations against both the
3 manufacturer and distributor defendants for
4 liability. All those allegations included McKesson
5 Medical to the extent they're ident- -- they're
6 directed as distributor defendants.

7 Go to then paragraph 282, there is a
8 subhead again, distributor defendants. And
9 remember, every time the complaint says distributor
10 defendants, McKesson Medical is specifically --

11 THE COURT: I understand.

12 MR. CONRAD: -- included.

13 THE COURT: I understand that.

14 MR. CONRAD: Paragraphs 282 all the way
15 through paragraphs 306 include specific allegations
16 that have -- that the distributor defendants have
17 done. It's a whole subpart of the complaint.

18 So paragraph 228 talks about the legal
19 duties that were legally required of the distributor
20 defendants. Paragraph 283 talks about what they
21 were required to do to create a system to identify
22 and report suspicious orders of controlled

1 substances.

2 The only part of this entire section from
3 282 through 306 that does not include McKesson
4 Medical is one paragraph which in the Alexandria
5 complaint is paragraph 293.

6 Paragraph 293 has several subparts that
7 specifically talk about federal government
8 regulatory and other activity target specifically at
9 some of the distributor defendants. And so this one
10 paragraph, paragraph 293, says, oh, by the way, some
11 of these distributor defendants have actually been
12 the target of -- of -- one was a settlement with
13 the -- with the DEA, another was a memorandum
14 agreement between one of the entity -- one of the
15 distributors and the DEA, another was a DEA issuing
16 a show -- a show cause. And these -- in that
17 paragraph McKesson Medical, at least as far as we
18 know right now, was not the subject of a DEA
19 enforcement or anything like that.

20 What the defendants tried to do is say,
21 well, because some of those specific distributor
22 defendants were the subject of that and you

1 specifically called them out, that somehow that that
2 should result in ignoring all of the other
3 complaint's allegations about what McKesson Medical
4 did. And that is frankly a -- not only an
5 inaccurate reading in the complaint, it's a -- it's
6 a -- there's no basis for that reading of the
7 complaint. It's absolutely abundantly clear from
8 the allegations that McKesson Medical is
9 specifically included in these dozens of allegations
10 about what the distributor defendants did wrong.

11 THE COURT: All right. I understand your
12 position.

13 MR. CONRAD: The next issue then, Your
14 Honor, beyond -- and just to wrap up on that, Your
15 Honor, there's more than a possibility of recovery
16 against McKesson Medical. Again, we -- we had to
17 clear about a one-foot bar, we cleared a ten-foot
18 bar on that. And the Court should reject that as a
19 basis of federal jurisdiction.

20 The last argument for federal diversity
21 jurisdiction has to do with Rule 21, and that has to
22 do with the -- the idea that the Court should

1 somehow sever off the distributor defendants from
2 this case. As I said before, this is a slightly
3 more widely focused argument. It includes all the
4 distributor defendants, not just McKesson. I'd say,
5 Your Honor, that first there's a -- there's a legal
6 issue here, which is that Rule 21, there are
7 multiple District Courts that have called into
8 question the use of Rule 21 to create -- in effect,
9 create diversity.

10 So, in other words, your -- your role --
11 the Court's role is to determine as a -- as an
12 initial matter whether or not there is federal
13 subject-matter jurisdiction. And if it doesn't have
14 federal subject-matter jurisdiction, the proper
15 course is to remand the case.

16 And so there's a -- there's a serious
17 question as to whether or not a Court that does not
18 have subject-matter jurisdiction in the first
19 instance can somehow manufacture that by severing
20 certain defendants under Rule 21, particularly in
21 the context of removal or specifically in the
22 context of removal.

1 We don't think -- we believe that it would
2 be improper to exercise any sort of discretion on
3 Rule 21 when there's clearly no subject-matter
4 jurisdiction here. However, to the extent that you
5 reach the Rule 21 severance argument, there are
6 multiple other District Courts in the opioid context
7 that have all rejected this particular argument
8 under these circumstances.

9 And again, Your Honor, the observations
10 from -- and there are several cases that deal with
11 this, but I'm going to specifically talk about Judge
12 Hendricks and one of her decisions out of South
13 Carolina. And what Judge Hendricks said was -- she
14 said, The facts alleged in the complaint are
15 sufficiently intertwined with respect to all of the
16 defendants. The claims are not so separate and
17 distinct that keeping them joined would result in an
18 injustice. On the contrary, keeping the parties and
19 claims joined would promote efficiency, minimize
20 delay, inconvenience, and expense to the parties.

21 Indeed, if the Court were to order
22 severance to obtain federal jurisdiction, the county

1 here stands to suffer significant prejudice as the
2 defendants in each case would have the ability to
3 shift blame and responsibility to an absent party.
4 So the manufacturer defendants would be able to
5 shift blame to the absent distributors, in the words
6 of Judge Hendricks, thereby forcing the county to
7 defend the actions of the absent defendants in order
8 to substantiate its claims against the defendants
9 present in each case.

10 Then Judge Russell in a -- in a case
11 involving -- involving the same issue out of the
12 city of Baltimore -- this was a -- this was a
13 Maryland decision. He said because the city's
14 claims against these defendants are factually and
15 legally intertwined with its claims against the
16 other defendants, the Court concludes that they're
17 necessary and dispensable -- indispensable under
18 Rule 19 and thus are not severable under Rule 21;
19 thus the Court will not sever these defendants to
20 create complete diversity among the parties.

21 Those are the kinds of things the judges in
22 district courts and the Fourth Circuit have

1 concluded when presented with this same argument.
2 Again, as I started, as Judge Hendricks points out
3 and as is clear from reading the complaint, these
4 are factually and legally intertwined issues.
5 You've got the manufacturer distrib- -- excuse me,
6 defendants who are making the drugs, you've got
7 distributor defendants who are distributing the
8 drugs; those issues and claims are intertwined and
9 you can't just simply carve one off the other.

10 And, in fact, as far as we can tell,
11 there's no case in the opioid context that has
12 determined that it's a good idea, under these kind
13 of circumstances with manufacturer and distributor
14 defendants, to grant severance.

15 THE COURT: All right. I understand your
16 theory.

17 MR. CONRAD: Your Honor, the bottom line is
18 that you can look throughout the -- it's -- the
19 jurisdictional arguments have been made here and,
20 frankly, the defendants don't have any specifically
21 on-point authority. All of -- all of the
22 authorities that is on point with these issues, all

1 is in favor of the plaintiffs, all of it's in favor
2 of remand. And what the defendants have done is
3 they take cases in other contexts that are not
4 material and on point and cobble together different
5 sorts of legal theories. They've taken snapshots
6 out of a long complaint and tried to put together
7 for you an argument that somehow, by taking all
8 these disparate things, we can sort of create
9 federal jurisdiction out of whole cloth.

10 The bottom line is that the Fourth Circuit
11 has addressed several of these issues specifically,
12 district courts in the opioid context have addressed
13 many of these issues specifically. And every single
14 one of those materially on-point decisions point in
15 the direction of remand.

16 THE COURT: All right.

17 MR. JORDAN: Good morning, Your Honor.

18 Bill Jordan again on behalf of the removing
19 defendants. I represent Optium and UnitedHealth
20 Group, Express Scripts, and other pharmacy benefit
21 managers also joined as -- as removing -- removing
22 defendants here. I'll address counsel's arguments

1 in turn starting with CAFA and then going into
2 federal question.

3 Your Honor, unlike many cases where a
4 matter has been removed, under CAFA the general
5 notion related to the presumption against removal
6 doesn't apply. The Supreme Court told us that and
7 the Dark Cherokee case said that, No anti-removal
8 presumption attends the cases invoking CAFA, which
9 Congress enacted to facilitate removal. Especially
10 where there are matters -- there are 1,500 matters
11 like this pending before Judge Polster in the MDL.
12 This is clearly a matter of national importance, the
13 opioid crisis is certainly a matter of national
14 importance and one that CAFA was enacted to ensure a
15 standard national framework for resolution.

16 To be sure, Your Honor, Virginia does not
17 have a Rule 23 class action procedure as a matter of
18 its rules of civil procedure, but what plaintiffs
19 have filed is a class action in name only. I'm
20 going to walk through why that is as to matter of
21 law and also why it is as a matter of equity.

22 Plaintiffs' counsel stated that they did

1 not bring this matter in a capacity as a
2 representative of its residents. They, however,
3 have relied upon the case West Virginia versus CVS
4 which granted remand, did not allow federal --
5 federal removal to occur, where the state was
6 bringing the case. In that case the state, as a
7 sovereign, was bringing a case in its parens patriae
8 authority.

9 A city or a county -- a city does not have
10 parens patriae authority. It is merely a political
11 subdivision of the state, it is a citizen of the
12 state. It can only sue in its own individual
13 capacity. And so when one then looks carefully at
14 the language that they put in their complaint, they
15 are absolutely the masters of their complaint, which
16 requires us to look at what they are asking the
17 remedy that the Court order.

18 The remedy that they are asking is a remedy
19 for both themselves as a citizen of the state, as an
20 injured party with the same injury, the same cost --
21 the same things being borne by its residents. They
22 are suing in the name of a -- of a party that has

1 been injured on behalf of itself and its residents.
2 And how do we know that. Well, let's look at what
3 they -- what they said and then compare it to the
4 language of their complaint.

5 They state, Plaintiffs seek relief and
6 damages for the harm caused to them, a municipality.
7 They say that the damages sought by the plaintiff --
8 this is in paragraph 6 of the rebuttal brief -- are
9 not damages common to any class members. Instead,
10 we seek damages, past, present, and future
11 expenditures of public funds.

12 In their rebuttal brief they say, There is
13 no claim in the complaint whereby the city is
14 bringing a claim on behalf of its citizens, such
15 that its citizens will be bound by any judgment.
16 This is demonstrably not true when one looks at the
17 language.

18 We cite to numerous paragraphs within the
19 complaint where if they prevail, if they were in
20 state court under Rule 1.1 relating to judgments in
21 Virginia, the residents of the state of Virginia --
22 or the residents of the city of Alexandria will, in

1 fact, be bound by their judgment. Why is that? We
2 have cited through numerous paragraphs, and I'll
3 just cite a few of those -- of those for you, Your
4 Honor.

5 Numerous paragraphs in the complaint,
6 Count 3 where they're seeking reimbursement of
7 monies paid by the manufacturers which would
8 necessarily bind the residents if judgment were
9 entered, where they want to know -- want to know
10 what the citizens and what the -- what the plaintiff
11 actually paid for the manufacturers' products. If
12 they prevailed and recovered to the \$100 million
13 they want, the residents would be bound by that
14 judgment. They could not bring a claim for
15 reimbursement of those funds.

16 Similarly, they state in Count 4 that the
17 defendants made misrepresentations and omissions of
18 material facts to plaintiffs and its residents to
19 induce them to purchase, administer, and consume
20 opioids; were they successful on that count, the
21 residents would be bound. Plaintiff then -- this
22 is -- that was at paragraph 371.

1 They state, paragraph 377, Plaintiffs and
2 its residents reasonably relied upon the
3 representations made by defendants, which caused
4 plaintiff, through its programs, departments, and
5 agencies, to incur -- to incur costs. The material
6 misrepresentations and reliance by the -- by the
7 residents.

8 Most notably, however, in their final count
9 for unjust enrichment, their equity count which I
10 really want to touch on here. They state that at
11 the time -- this is paragraph 431, in exchange for
12 opioid purchases and at the time plaintiff and its
13 residents made these payments to the manufacturers
14 or distributors, plaintiffs and its residents
15 expected the defendants had not misrepresented any
16 material facts. And they then seek disgorgement of
17 profits on behalf of the plaintiff, the City of
18 Alexandria and its residents. Were the Court to
19 issue a ruling, it would bind those residents who
20 would then be precluded from recovering those types
21 of damages.

22 And so on the -- the point where we -- so

1 we then look through and say they have named -- they
2 have created, as a matter of law, a class action in
3 name only. We then look through and see, are the
4 typical standards that are required for the
5 maintenance of a class action apparent on the face
6 of the complaint. Commonality, typicality,
7 numerosity, adequacy, and they absolutely are. And
8 we go through each of those requirements within our
9 notice of removal.

10 And so as a matter of law, given the
11 language of CAFA, they have set forth a class action
12 of national importance that CAFA was designed to
13 seek to be brought in federal court, but it's not
14 just as matter of law, there actually is a provision
15 as a matter of equity in Virginia that allows
16 representative actions to be brought. They bring
17 claims at equity as well as at law.

18 This line of cases goes back all the way
19 into the -- into the 19th century, started with a
20 case called Bull versus Read in 1855, it's 54 Va.
21 78, where the Virginia Supreme Court says that the
22 act in question is, when necessarily affecting all

1 inhabitants of the district named in respect to
2 persons or property who were liable to taxation and
3 as they were many in number that had a common
4 interest, it, this representative lawsuit, was
5 allowable, according to settled practice, for some
6 to file a bill on behalf of themselves and other
7 inhabitants similarly situated, seeking any relief
8 of which they might all have in common.

9 And it really goes back to common law.
10 There's a matter called a representation in equity
11 at common law incorporated in Virginia and relied
12 upon by the Virginia Supreme Court in a strain of
13 cases. It started with Bull, there's a case called
14 Blanton in which a -- citizens were allowed to bring
15 a representative action against a manufacturer, a
16 fertilizer company. That is at 77 Va. 335.

17 There is an act -- matter called Boshier
18 versus Richmond at 89 Va. 455. And in each of those
19 cases, as a matter of equity, which still exists
20 under Virginia law, a class action or a
21 representative action may be maintained. And here,
22 that's exactly what they are seeking to do. They

1 are not a state sovereign. They may not bring a
2 parens patriae action. They are seeking recovery
3 for the same injuries that they have on behalf -- on
4 behalf of their residents as a part of that class;
5 and, therefore, removal under CAFA is appropriate.

6 I'd like to talk as well about the federal
7 question argument. The federal question is just as
8 appropriate for removal. My colleague on the
9 plaintiff's side is correct that a claim under the
10 Grable standard that the Supreme Court has
11 articulated does require that the federal question,
12 the federal issue be necessary for the resolution of
13 that particular claim.

14 The claim that we look at, Your Honor, is
15 count Number -- it changed. Let's see. Count
16 Number VI. In Count Number VI, the plaintiffs cite
17 to both the Virginia Drug Control Act, but also cite
18 to federal law, the Federal Controlled Substances
19 Act. And that is the basis for our federal question
20 removal.

21 The federal Controlled Substances Act,
22 national uniform law governing the distribution

1 manufacturer sale of controlled substances,
2 including the substances at issue here. The
3 Virginia law on which they're relying incorporates
4 expressly the violation of the Virginia law. It
5 says that if you violate the Controlled Substances
6 Act, you violated the Virginia law. It sets forth
7 standards that are the standards that it must comply
8 with the Controlled Substances Act. There's not
9 separate Virginia law that is different from the
10 Controlled Substances Act. One has -- if one
11 violates the Controlled Substances Act, it has
12 violated the Virginia law.

13 And, therefore, all it has done is -- where
14 they say it's Virginia law and federal law, all that
15 claim is is for a violation of the Controlled
16 Substances Act that is necessary, it is required, it
17 is fundamental to that particular claim, it is
18 entirely appropriate for Grable removal, which
19 admittedly is one that the Supreme Court has said is
20 a narrow grounds for removal. You have to find that
21 the federal question is, in fact, appropriate for
22 the elements of that particular claim; and we submit

1 it is.

2 You -- in order for them -- in order for
3 the plaintiffs to be successful on that claim of
4 negligence, per se, in count VI, it definitively
5 requires a resolution of the Controlled Substances
6 Act for them to prevail. And that's why we believe
7 that is appropriate grounds for removal.

8 My colleagues are going to -- you may want
9 it hear again from the plaintiffs. My colleagues,
10 however, after hearing this great argument, are
11 going to address the issue of why we believe that a
12 stay is, in fact, appropriate after you've heard
13 argument on -- on the remand, the why -- given the
14 national importance of these and given similar
15 issues pending before the MDL judge, why it's
16 actually appropriate for Your Honor to --

17 THE COURT: All right.

18 MR. JORDAN: -- stay his decision at this
19 time.

20 THE COURT: All right.

21 MR. MASSIE: Good morning, Judge. Wade
22 Massie from Abingdon on behalf of the Purdue

1 defendants, as I said earlier.

2 We're the parties that filed the
3 supplemental notice, so the original notice was
4 filed and then we appeared and filed a supplemental
5 notice. Our supplemental notice deals with the
6 issue of fraudulent joinder and severance. So those
7 are the two subjects I wanted to discuss this
8 morning.

9 Just to orient the Court, there are four of
10 these distributor defendants and they are described
11 in the complaint at paragraphs 92 to 113. One of
12 them -- it's a little confusing because some of the
13 names are the same, but one of them is called
14 McKesson. And that one is described as one of the
15 largest distributors of opioid pain medications in
16 the country, including Virginia. And in 2015,
17 McKesson had a net income in excess of 1.5 billion,
18 so that's one of the distributors that's been sued
19 here.

20 A second one that was sued is McKesson
21 Medical-Surgical. I want to pass over that one just
22 for a second. The third one that has been sued here

1 is called Cardinal or Cardinal Health. And Cardinal
2 Health is alleged to distribute pharmaceuticals to
3 retail pharmacies and institutional providers to
4 customers in all 50 states, including Virginia, so
5 it's a large entity.

6 And the last one named is AmerisourceBergen
7 Corporation, and it likewise is alleged to
8 distribute pharmaceuticals to retail pharmacy and
9 institutional providers and customers in all 50
10 states. And those three are alleged to have
11 employees as well, obviously, doing this.

12 Now, the one we're focused on was this one
13 I passed over for a second, McKesson Medical. And
14 the allegation against them in this part of the
15 complaint is that it engages in business in Virginia
16 as a wholesale distributor of pharmaceuticals,
17 including opioids. And they also allege they have a
18 registered agent. That's what they say about them.

19 Now, if you look at the way the complaint
20 is set up, it has a section in it beginning about
21 paragraph 166, which they call themselves -- they
22 call the particulars regarding each defendant

1 group's role in the opioid epidemic. And if you go
2 through that section of the complaint dealing with
3 these distributor defendants, there are specific
4 references to McKesson, that first one I mentioned,
5 to Cardinal, and to Amerisource, but there is no
6 mention at all of McKesson Medical-Surgical, which
7 is the one we're putting in question.

8 And I would invite the Court's attention to
9 paragraph 293 which has a specific lineup of claims
10 against those companies. And it's really the -- the
11 meat of the complaint because it says, Despite their
12 duties -- and they go through this long windup of
13 what the duties are -- despite their duties,
14 defendants have knowingly and negligently allowed
15 diversion. And then they cite DEA action taken
16 against the companies, and they say the wrongful
17 conduct and inaction have resulted in numerous funds
18 and penalties including -- and that's where they
19 list these other companies, and no mention of this
20 Medical-Surgical -- McKesson Medical-Surgical.

21 So we question that and we ask, you know,
22 where are the specific allegations against this

1 company that they allowed their product to be
2 diverted in Alexandria, that Alexandria was damaged
3 by this. All -- all we have and you've heard here
4 are these general allegations but no -- no real
5 specific allegation as to McKesson Medical-Surgical.
6 So we think the case is similar to one that was
7 decided a few years ago in Salisbury versus Purdue
8 Pharma where the plaintiff sued nine manufacturers
9 and two pharmacies.

10 And, of course, they said the pharmacy
11 should have protected what they were doing and the
12 manufacturers should have protected what they're
13 doing, but there was no real connection in the case.
14 There was no real allegation that the pharmacies had
15 actually sold the opioids to the plaintiffs. And
16 the Court in that case found fraudulent joinder.

17 We acknowledge this standard that's been
18 stated in the cases, this no possibilities standard,
19 but the cases also say it's to be applied reasonably
20 and there must be a reasonable basis for predicting
21 liability. And when we have a challenge to this, we
22 ask where is the causation, where is the claim that

1 it happened in this city, where is the claim that
2 something was diverted that this particular entity
3 sold. There are really no answers to that.

4 The plaintiff's brief and also their
5 argument here this morning addresses other cases
6 that they say support their position. And they --
7 they say in their brief, and I think they said this
8 morning, that the district courts have already
9 rejected all of our arguments, already heard and
10 rejected all of our arguments. That was the --
11 that's the statement. We submit that's not
12 accurate. They cite cases from South Carolina, they
13 cite a case or two from Maryland, they cite a case
14 from West Virginia, they cite some cases from Texas,
15 but none of those cases deal with this point that
16 we're raising.

17 South Carolina cases involved a different
18 fraudulent joinder argument altogether. It involved
19 an argument that the plaintiff had no real intention
20 of obtaining a judgment against one of these minor
21 players that had been named in the complaint. So --
22 but there were in that case specific allegations

1 made. So it's not like the situation here where we
2 don't have those allegations.

3 The Maryland cases did not involve a claim
4 of fraudulent joinder at all. There was no claim of
5 fraudulent joinder in those cases that were cited to
6 you. There was a misjoinder argument, which is
7 something different.

8 The West Virginia case did involve
9 fraudulent joinder, but a very specific issue of
10 West Virginia law, whether an employee or agent
11 could have liability under the circumstances.
12 Again, there were allegations against the person.
13 The question was did that state a claim under West
14 Virginia law. So it is a different situation.

15 Likewise, the Texas cases that are cited
16 did not involve fraudulent joinder but this concept
17 of fraudulent misjoinder, which is something
18 different.

19 There are, I understand, a lot of cases,
20 many cases in the MDL now that involve this
21 situation of a removal based on fraudulent joinder
22 or misjoinder or severance. In fact, one of my

1 colleagues collected and filed a list of those cases
2 in the Western District of -- Western District of
3 Virginia. I don't think it's filed here, but it's
4 filed very recently, on January 15th. And in that
5 filing they identified 97 cases where there was a
6 removal and then a subsequent transfer to the MDL,
7 which has -- has similar issues pending. So that's
8 fraudulent joinder.

9 On the severance part, that is a -- that is
10 a completely separate argument and position. And if
11 you look at a severance issue, if the person is not
12 fraudulently joined -- so if -- even if the person
13 is in the case, the Court would need to consider
14 whether that person should be severed.

15 And Rule 21 would allow a severance so long
16 as the nondiverse party is not required to be joined
17 under Rule 19. So if they're not an indispensable
18 party, not a required party under 19, they can be
19 severed in order to maintain diversity.

20 Now, we submit there's no question that
21 this party, McKesson Medical, is not an
22 indispensable party to this case. If anything, it

1 would be a permissive party that -- that one may add
2 or not add, but it would not be an indispensable
3 party.

4 The argument is made that McKesson
5 Medical's liability is intertwined with other
6 defendants; but, again, that's not a prohibition
7 against a severance. Rule 20 assumes that there's
8 some connection among the defendants to bring in the
9 same case, that they arise out of a common
10 transaction or occurrence or have a common issue.
11 So that's -- that's not a prohibition.

12 There is a case that's been cited to Your
13 Honor, Mayor & City Council of Baltimore, that
14 suggests that in that case some defendants were
15 indispensable; but if it's cited for the concept
16 that any joint tortfeasor, any joint wrongdoing is
17 indispensable, then that's -- that's directly
18 contrary to Supreme Court law in the Temple case
19 where the Supreme Court said that joint tortfeasors
20 are not indispensable parties, they are permissive,
21 and you don't have to add them.

22 And we know this just from practice because

1 if you -- if you had a situation where every joint
2 tortfeasor had to be in every case -- every tort
3 case, there wouldn't be too many cases that could
4 go. A lot of them -- a lot of cases would be
5 disqualified just because you didn't have every
6 possible tortfeasor there in the case.

7 So we submit that -- that the Court ought
8 to consider, if it considers this defendant properly
9 joined, it ought to sever this defendant and exclude
10 it from the rest of the case.

11 I'll just make one -- one more point, if I
12 may, Judge, and I'll sit down. There's also a
13 suggestion made that diversity has to exist at the
14 time the complaint is filed. And, of course, we
15 know that to be the general rule. You have to have
16 diversity at the time the complaint was filed.

17 It's obviously true generally, but Rule 21
18 is a big exception to that, so this severance is
19 a -- is a huge exception. There are Fourth Circuit
20 cases, this Beatrice Pocahontas case and U.S.
21 Supreme Court case, Newman-Green, which holds
22 explicitly that you can sever even after an action

1 was brought, even on appeal. So we think we're on
2 solid ground on that.

3 Thank you, Judge, for your time. I
4 appreciate it. Thank you.

5 MR. CONRAD: Your Honor, unless I'm
6 mistaken, I think the defendants have gone through
7 all their responses. So I don't think there is
8 anyone else from the defendants' side.

9 THE COURT: All right. Just quickly now,
10 I've heard a lot of argument.

11 MR. CONRAD: I know you have, Your Honor,
12 and I want to go very, very quickly. And I'm going
13 to go in the exact same order I started and the same
14 order you've heard it. So I want to make sure I
15 just touch on a couple of quick things on each
16 point.

17 So I'll start with the CAFA issue. So,
18 first of all, there are -- there are two main points
19 that I want to make, one is legal and the other is
20 factual. The legal points I want to make are that
21 the West Virginia v. CVS Pharmacy case, the Fourth
22 Circuit case, specifically said that the whole issue

1 of whether or not the complaint was or was not a
2 parens patriae action, which is something the
3 defense had talked about, was not critical to the
4 analysis. That was what was critical to the
5 analysis was that the complaint was not brought
6 under a state statute or rule of judicial procedure
7 similar to Rule 23. Don't have that here, so West
8 Virginia is still on point.

9 Secondly, in the AU Electronics case, which
10 was a later Fourth Circuit case, the Court rejected
11 what's called the claim-by-claim approach, the
12 Fourth Circuit -- and adopted or embraced something
13 called a whole case approach. What that means is
14 you can't just go claim by claim and say, well, this
15 particular claim looks like a class action,
16 therefore there's CAFA jurisdiction. You have to
17 look at the complaint as a whole to determine
18 whether the complaint as a whole has CAFA
19 jurisdiction. So that's the legal point.

20 The factual point I want to make is that
21 the defendants are simply incorrect on the
22 allegations in the complaint. For example, they

1 said that Count III includes claims on behalf of the
2 city and its residents, that simply is not the case
3 with this complaint.

4 This complaint, Count III, is a Virginia
5 Consumer Protection Act claim. The Virginia
6 Consumer Protection Act says plaintiff -- which is
7 the City of Alexandria, seeks reimbursement of all
8 monies paid for defendants' products by plaintiff,
9 period.

10 It says, as a proximate result of
11 defendants' deceptive acts, defendants have caused
12 plaintiff, the city, to incur excessive costs
13 responding to the opioid crisis. And then it lists
14 costs, including the cost of healthcare, emergency
15 medical center services, social services, same thing
16 in every single one of these counts. I could go
17 through and read them all to you --

18 THE COURT: Well, no, don't do -- don't do
19 that. I understand you all don't agree on the facts
20 and you're not going to get those resolved right now
21 by simply repeating again what you told me before.
22 So if you've got something new to tell me, go ahead,

1 but I'm getting tired of listening now to -- I've
2 given you more time than normal to do the -- make
3 the motion, anyway. And I'm getting a little
4 impatient now, so about two minutes I want to wrap
5 it up.

6 MR. CONRAD: I got you, Your Honor.
7 Federal question, the only point I make is they
8 point to one count, count VI. And they say, Well,
9 even though it says it's under Virginia law and
10 incorporates federal law, therefore, because count
11 VI involves necessarily some discussion of federal
12 law at some point, therefore, there's federal
13 question jurisdiction under this narrow loophole.

14 Bottom line is there are many more than
15 count VI. There's a bunch of counts, and all the
16 other counts involve state law. And, in fact, count
17 VI involves state law. Their only point is that
18 count VI state law, the Virginia controlled
19 substances legislation, also refers and incorporates
20 some federal law. And that doesn't transform it
21 into a -- into this exception for *Gunn v. Grable* --
22 excuse me, *Gunn v. Minton*.

1 The second point I make is it necessarily
2 raises is only one of the four required elements
3 that they have to meet. They also have to show that
4 the issue is substantial in the sense of it impacts
5 the federal system as a whole. And there are opioid
6 context cases that talk about the fact that this was
7 not substantial because it doesn't impact the
8 whole -- the -- the federal system as a whole in the
9 way that the Supreme Court has said is important for
10 these cases. So that particular area of federal
11 jurisdiction is not available.

12 THE COURT: Okay. Now --

13 MR. CONRAD: I'm sorry, Your Honor, I
14 have -- I have one more piece on the diversity
15 jurisdiction. So 30 more seconds.

16 THE COURT: 30 seconds, then I've heard
17 enough.

18 MR. CONRAD: Yes, sir. With respect to
19 the -- there are multiple cases out of South
20 Carolina, out of Maryland that all deal specifically
21 with fraudulent joinder. And in particular in South
22 Carolina, they all deal with this question of

1 whether or not there's sufficient allegations. It's
2 a complaint-by-complaint analysis. We pointed out
3 to you all of the -- all of the pieces --

4 THE COURT: Okay. I'll take a look at
5 those cases.

6 MR. CONRAD: Also Mr. Massie, in talking
7 about Rule 21, he was talking specifically about
8 severing McKesson Medical. That's actually not what
9 they've asked for. They've asked for severance of
10 all the distributor defendants, not just one,
11 McKesson Medical. I would argue to the extent
12 they're limiting somehow for the first time here
13 today, it's totally improper, Rule 21 doesn't apply
14 to that.

15 And to the extent that they want to stick
16 with their argument that all distributor defendants
17 should be severed, that should be rejected as well.

18 THE COURT: All right.

19 MR. MENCHEL: May it please the Court, my
20 name is Matthew Menchel and I represent the Express
21 Scripts defendants and I'm here to discuss the
22 motion to stay.

1 THE COURT: Okay.

2 MR. MENCHEL: Your Honor, I recognize that
3 I'm in the Eastern District of Virginia and that
4 using the words "motion to stay" an anathema to this
5 district. But briefly deferring a ruling in this
6 particular case under these circumstances so that
7 the jurisdictional issues that are being heard in
8 the MDL, which are the same issues that are being
9 heard here so that these issues can be joined there,
10 makes a lot of sense. And it's also consistent with
11 the case law --

12 THE COURT: That's the questions of remand
13 as well. Jurisdiction, remand, do the cases stay
14 here, all of those issues will be decided --

15 MR. MENCHEL: Yes, Your Honor.

16 THE COURT: -- in the MDL then.

17 MR. MENCHEL: Yes, Your Honor. Right now,
18 as was mentioned by my other colleague, there are
19 approximately 100 cases pending that have been
20 removed on jurisdictional issues. The vast majority
21 of those have motions to remand attached to them or
22 will have motions to remand attached to them going

1 forward.

2 And what the Eastern District of Virginia
3 has said in the Commonwealth of Virginia
4 versus [sic] ex rel. Integra, courts frequently
5 grant stays while awaiting a JPML decision. That's
6 what we're doing here, we're expecting that decision
7 be handed down in March -- about the inclusion of a
8 pending case into an MDL, even when other motions
9 remain pending before the district court, including
10 motions to remand.

11 Another decision in the Eastern District,
12 Pagliara versus Federal Home Loan Mortgage
13 Corporation, said the same thing. Additionally,
14 courts frequently grant stays in cases when an MDL
15 decision is pending.

16 THE COURT: Who decided that? Those two
17 cases you're citing.

18 MR. MENCHEL: One second, please, Your
19 Honor. This was Judge Cacharis, did I say that
20 correctly?

21 THE COURT: Yeah.

22 MR. MENCHEL: And the Commonwealth of

1 Virginia case, Judge Lauck.

2 THE COURT: All right.

3 MR. MENCHEL: I think we cited these in our
4 papers, Your Honor.

5 THE COURT: Go ahead.

6 MR. MENCHEL: So what we have here, Your
7 Honor, is this general rule that courts defer ruling
8 on the issues like motions to remand when there's an
9 MDL because it makes perfect sense to do so. There
10 are 1,600 cases currently in the MDL that are almost
11 factually identical to the cases that exist here
12 today. So it makes sense to stay this case so that
13 it can be brought into the MDL.

14 There's already been a decision made by the
15 JPML conditionally transferring the case in because
16 it recognizes factually they look to be exactly the
17 same as many other copycat complaints that have
18 already been filed there.

19 So what I want to use by way of example is
20 this CAFA issue which Your Honor has heard a
21 tremendous amount of argument about here today.
22 It's a complex difficult issue and it's also an

1 issue of first impression that will be decided by
2 whatever court decides it, because there's unique
3 facts and circumstances here. This is not a parens
4 patriot act -- patriae act that's been resolved
5 before, it's an issue of first impression.

6 And there are currently, right now, pending
7 before Judge Polster in the MDL other CAFA remand
8 motions addressing the same issues. We cited those
9 in our papers. One is Jefferson County, it's in the
10 Eastern District of Missouri, that's been
11 transferred into the MDL. And another one, Your
12 Honor, is the Noble County in the Southern District
13 of Ohio case, also removed on CAFA, also right now
14 pending before Judge Polster on the motion to
15 remand.

16 So those issues as well as the federal
17 question issues and the diversity jurisdictions and
18 all those severance issues, those issues are already
19 in the MDL in very similar cases. And so it makes
20 sense from a point of judicial economy and for
21 uniformity rulings that these -- this case gets
22 transferred there as well and you defer this rule

1 and let Judge Polster decide that.

2 Now, just what I'm expecting you're going
3 to hear from plaintiff's counsel is they can't bear
4 the delay, it's going to -- it's going to prejudice
5 them severely if there's a delay. I want to remind
6 Your Honor that in this case the complaint was filed
7 ten months ago in the Circuit Court of Alexandria,
8 they've never served us with it, never. And three
9 times the Circuit Court set this down for status
10 conference and three times it was deferred until we
11 finally removed it out. They're not in a rush to
12 prosecute this case.

13 THE COURT: All right. You're giving me
14 rebuttal before I hear the --

15 MR. MENCHEL: Fair enough.

16 THE COURT: -- hear the argument.

17 MR. MENCHEL: Fair enough, Your Honor.

18 I'll sit down and I'll address it on rebuttal.

19 Thank you.

20 MR. SPIVEY: Your Honor, Ed Spivey here on
21 behalf of the plaintiff. Let me start where
22 Mr. Menchel ended up. This case is one of several

1 that have been before the Virginia Supreme Court.

2 On November 20th the Virginia Supreme Court issued
3 an order that to our knowledge the Virginia Supreme
4 Court has only issued a handful of times in history.

5 On November 20th the Virginia Supreme Court
6 certified a three-judge panel of Circuit Court
7 judges to preside over these consolidated
8 proceedings, Judge Filson from Rockbridge County,
9 Judge Milam from Danville, and Judge Hurley from
10 Tazewell County.

11 And the reason that this City of Alexandria
12 case was postponed was because of that very issue.
13 It takes six plaintiffs, under Virginia procedure
14 and under Virginia Multiple Claimant Litigation Act,
15 to consolidate cases. And so there were subsequent
16 cases filed over the course of last year and it has
17 been the plan of the City of Alexandria and every
18 one of the other affected localities who are
19 plaintiffs in cases in circuit courts that have been
20 removed across Virginia to consolidate and to deal
21 with these matters efficiently, in an organized way.

22 And so, Your Honor, the Virginia Supreme

1 Court's action shows that, at the highest levels,
2 the Virginia state court system is already involved
3 in this. And the defendants have yanked us out of
4 that state court system that was already underway
5 under the guise of judicial economy without any
6 regard for the efforts of the Virginia court system
7 and, under the barest and slimmest of reads, sought
8 removal jurisdiction. And that's what brings us
9 here today, Your Honor.

10 If the defendants get their way, the City
11 of Alexandria will be sent off to a federal court in
12 Cleveland beside plaintiffs like the City of Chicago
13 and the State of Alabama with only the slimmest hope
14 that their issues can be resolved anywhere in the
15 foreseeable future. Because here's what we know
16 about the MDL -- and let me say at the very outset,
17 none of my comments are intended as a criticism of
18 Judge Polster who has presided over that MDL since
19 its inception and who is doing the best job humanly
20 possible to try to manage a behemoth case.

21 What we have a gripe with, Your Honor, is
22 that these defendants have sought to embroil our

1 client in it when it is against our client's will.
2 Indisputably, our client, who is the master of its
3 complaint, has filed only state claims in a state
4 Circuit Court; and there is no basis to disrupt and
5 derail that effort through this junket to Federal
6 Court.

7 Here's what we know about the MDL, Your
8 Honor --

9 THE COURT: All of your friends or your
10 compatriots are in federal court, haven't all these
11 cases been removed?

12 MR. SPIVEY: Your Honor, no, we -- we've
13 got a dozen cases in state court, Circuit Court,
14 that were removed, yes, you're correct; and they are
15 all the subjects of motions to remand like the one
16 pending here.

17 I think it's important to point out there
18 were other state -- Virginia localities who have
19 filed suit, the defendants cite to them in their
20 briefing, but this is an important thing to know,
21 those cases were filed in federal court. They
22 contained federal statutory causes of action. Those

1 plaintiffs wanted to be in federal court and wanted
2 to be in the MDL. There was absolutely no
3 opposition to the transfer of those cases to the
4 MDL.

5 The City of Alexandria and another dozen
6 plaintiffs like the City of Alexandria, in a number
7 that will grow, want to be in state court. So those
8 other Virginia cases that are now in the MDL are
9 completely beside the point.

10 THE COURT: Right. Well, the ones that
11 were filed simply under state -- supposedly state
12 causes of action; those have all been removed as
13 well, have they not?

14 MR. SPIVEY: They have, Your Honor. And
15 they're all pending before District Court Judge
16 Dillon in the western district before whom we
17 appeared yesterday on these same types of issues,
18 these same motions.

19 So here's what's important to know about
20 the MDL because it's a critical distinction from any
21 of the cases they've cited. Judge Polster convened
22 that MDL in December of 2017, 14 months ago. And

1 we've put into the record the transcript of his
2 first organizational meeting of counsel, and in that
3 first meeting he specifically said with regard to
4 motions to remand that had already been filed in
5 cases that were referred to him initially in the MDL
6 in December of 2017, that he was going to let them
7 hang there. And then he issued an order which put a
8 moratorium on the filing of motions. This is an
9 order that was entered on April 11th, 2018, and he
10 specifically referenced motions to remand. And what
11 that order says is the Court will adopt a procedure
12 based on input from the parties to efficiently
13 address the filing and briefing of motions for
14 remand at an appropriate time in the MDL
15 proceedings.

16 Here's what I can tell you with absolute
17 certainty. No procedure has ever been adopted in
18 the MDL to deal with those motions for remand as we
19 stand here today, and those motions for remand that
20 were part of the very initial group of cases that
21 got sent to the MDL in 2017 -- and there were many
22 of them -- stand unresolved and undecided today.

1 That's what we know about the MDL.

2 And so -- and, again, I'm sure that's for
3 good reason, but what we're saying, Your Honor, is
4 you've got to look past this tantalizing prospect
5 that the defendants hold out to you that, oh, this
6 is just a short delay. Oh, it won't be -- it won't
7 be that bad on the plaintiff. Your Honor, we know
8 that if we get transferred into that MDL, we're
9 never getting out or we're not getting out for a
10 very long time.

11 And so here's what I'd like to make sure
12 you understand about the timing of things, the
13 defendants, the day after or two days after they
14 removed this case, filed what's called -- called a
15 Notice of Tag-Along Action with a judicial panel on
16 multidistrict litigation. They identified this case
17 to the JPML and that, as they knew it would,
18 triggered a reflexive order from the JPML,
19 conditionally transferring this case into the MDL.

20 Now, that was a conditional transfer order
21 and it specifically said that the plaintiff had an
22 opportunity to file a notice of opposition, which we

1 did timely about two -- two weeks ago. We have
2 also, pursuant to the JPML's rules, filed a motion
3 to vacate that CTO. And we are told, although we
4 have no assurance, that nothing will happen in the
5 meantime. We are told that that motion to vacate
6 will be heard at the JPML's next hearing session in
7 late March 2019.

8 We know of no assurance that the JPML won't
9 act on that CTO before then, but the defendants have
10 stated that that is when the motion to vacate will
11 be heard. And what we also know is that, in the
12 course of this opioid MDL, the JPML has never failed
13 to render final a conditional transfer order.

14 So I think everybody agrees that if we get
15 to that date, this case is going to be transferred.
16 And without any desire on our part, our case is
17 yanked out of the City of Alexandria and we're off
18 in Cleveland for some indeterminant time.

19 Your Honor, that is not the way federal
20 jurisdiction is supposed to work. What these
21 defendants are asking you to do is to engage in
22 nonresolution of what should be the primary first

1 and all-important question that this Court has about
2 this case; mainly do you have jurisdiction over it.
3 That is the way the system of limited federal
4 jurisdiction is supposed to work, and that, Your
5 Honor, we need to look no further than to the Fourth
6 Circuit to know that.

7 In several cases the litmus test is laid
8 out. The threshold question in any matter brought
9 before a federal court is whether the Court has
10 jurisdiction to resolve the controversy involved,
11 that's 17th Street Associates. Courts typically
12 must construe removal jurisdiction strictly because
13 of the significant federalism concerns implicated by
14 it. That's a Fourth Circuit's decision in Maryland
15 Stadium.

16 The burden of demonstrating jurisdiction
17 resides with the party seeking removal. Thus, in
18 deciding whether to remand, this Court must resolve
19 all doubts about the propriety of removal in favor
20 of retained state jurisdiction, that's the Fourth
21 Circuit in the Hartley case. That's the -- that's
22 the way things are supposed to work.

1 The way the defendants would have you
2 address this stands that on its head. It's
3 completely upside down, they urge you not to resolve
4 jurisdiction. And, Your Honor, we submit that the
5 prejudice to our client if the Court would -- would
6 do that is extreme because this is not a short
7 delay, it's a small delay on the way to a very
8 lengthy delay in a situation where there is no basis
9 for federal jurisdiction.

10 You just heard more argument than you
11 wanted to hear on the issue of remand, but, Your
12 Honor, when you consider those arguments and you
13 consider the on-point precedent from the Fourth
14 Circuit, the on-point precedent from all the other
15 district courts within the Fourth Circuit that have
16 dealt with these identical issues, the on-point
17 precedent of a case out of the District Court of New
18 Hampshire decided by Judge Barbadoro about a year
19 ago that utterly rejected this Class Action Fairness
20 Argument they've come up with a year ago, and
21 they're still making the argument to you today.

22 Your Honor, when you consider those things,

1 you will see that there is no basis for federal
2 jurisdiction, and that should be your primary
3 inquiry. I realize it requires ignoring this
4 enticing prospect that they want to hold out that
5 because there is going to be just a short delay,
6 this won't harm the City of Alexandria, but, Your
7 Honor, that is utterly false.

8 So I don't want to belabor. I do think
9 it's important, though. While I mentioned that New
10 Hampshire case to point out -- Your Honor may know
11 Judge Barbadoro, I do not. However, in the course
12 of that case, he also dealt with and denied a motion
13 to stay. And in doing so he talked about his
14 experience both as a transferor and transferee MDL
15 judge. And, importantly, he talked about the fact
16 that he had sat on the Judicial Panel of
17 Multidistrict Litigation and he endorsed the view
18 that we suggest is the proper one that transferee
19 courts -- MDL transferee courts and the JPML welcome
20 the intervention of the transferor district court on
21 issues like remand.

22 And, Your Honor, we only have to look to

1 events of earlier this week to know that that's the
2 case here. On Monday, Judge Polster in the MDL has
3 decided only four motions to remand. None involved
4 cases like ours. None involved local government
5 plaintiffs. Two were tribal cases, cases where
6 Native American tribes had made claims against the
7 opioid industry; and Judge Polster dispensed with
8 the removal issues in that case under the federal
9 officer basis for removal and, in fact, in that case
10 denied motions to remand.

11 Two other cases, both of them brought by
12 state attorney generals, one on behalf of the State
13 of Montana, one on behalf of the State of Kentucky,
14 those are not the kind of cases we're talking about
15 here that are sitting there backlogged on the shelf.

16 THE COURT: I understand.

17 MR. SPIVEY: But here is the important
18 thing that happened on Monday, he decided the State
19 of Kentucky's case and he wrote a very short
20 opinion. And you know what he relied on, he relied
21 on other district court cases that had refused to
22 stay their proceedings and had denied motions to

1 remand -- I'm sorry, granted motions to remand.

2 He granted the State of Kentucky's and the
3 State of Montana's motion to remand, and in doing so
4 he was glad to have the precedent of other District
5 Courts to base his opinion on. So that's a false
6 premise here, Your Honor.

7 The -- the -- the need --

8 THE COURT: Well, if he's doing it, maybe
9 he ought to do this one.

10 MR. SPIVEY: But, Your Honor, here's the
11 situation -- that's why I say --

12 THE COURT: I know what you're going to say
13 and, just because I work quick, I'm not sure that
14 makes the difference. Just because I give you a
15 quick decision, I'm not sure that I buy that the
16 City of Alexandria needs a quick decision or it's
17 going to be harmed with a delayed decision, but I --
18 I understand what you're telling me.

19 Let me -- let me hear the man -- I mixed it
20 up a little while ago. I think we've belabored it
21 long enough. I didn't come out prepared to give you
22 a decision here this morning and I'm not going to do

1 it. I'm going to take a look -- a further look at
2 this and you'll get a decision from me pretty
3 promptly.

4 MR. SPIVEY: I appreciate that, Your Honor.
5 And I do appreciate the dispatch with which we've
6 gotten here.

7 Outside the front door of this courthouse
8 it says what is our mantra, and this is a
9 prototypical example of it, justice delayed here is
10 justice denied. That doesn't mean you need to rule
11 from the bench today and I'm not asking you to and I
12 welcome your deliberate review of the papers because
13 I think you'll see there's no basis for federal
14 jurisdiction here and so that -- that's our
15 fundamental point.

16 THE COURT: All right. Is there anything
17 else you want to tell me now?

18 MR. MENCHEL: Briefly, if I may. Your
19 Honor, what the plaintiff wants in terms of where
20 they file a lawsuit, I think Your Honor knows, is
21 not the dispositive issue. When you file what is,
22 in fact, in all but name a class action, it gets

1 removed under CAFA. When you file a case that
2 implicates interstate questions of federal law, it
3 gets removed to the federal courts because it
4 implicates important federal questions.

5 Despite what my colleague has said, the
6 CAFA issue that's been argued here today has not
7 been argued anywhere else and resolved yet in this
8 country. Okay. It will be a decision of first
9 impression. It ought to be resolved by Judge
10 Polster because there are similarly situated
11 plaintiffs with the same motion pending before him.
12 Judicial economy and uniformity of rulings weighs in
13 favor of letting Judge Polster do this.

14 Also real quickly, in the -- this argument
15 that they're going to be irreparably harmed by
16 joining 15- or 1,600 other cases that allege the
17 exact same thing was squarely rejected in the
18 Northern -- in the District Court in the Northern
19 District of Oklahoma in the Board of County
20 Commissioners of Pawnee County versus Purdue Pharma.
21 Exact same argument they made there and this is what
22 the Court said, quote, The plaintiff argues that it

1 will be irreparably harmed by a transfer to the MDL
2 because, quote, Judge Polster in the MDL has held
3 that he will not act on any motions to remand and
4 placed a moratorium on filing such motions. Exactly
5 the same argument that he just made.

6 However, at a hearing on December 13th,
7 2017, Judge Polster expressed his preference for,
8 quote, a framework that would allow consistent
9 resolution of remand motions. But the Court goes on
10 to note a preliminary assessment of the
11 jurisdictional issues in this case suggest that they
12 are not straightforward. Moreover, similar issues
13 have already arisen in cases that have been
14 transferred to the MDL. The Court allowed the stay
15 and allowed the case to be transferred into the MDL,
16 and a hundred other Courts have done the same thing
17 for the same reason.

18 We think it's in the interest of judicial
19 economy and uniformity that you should transfer
20 the -- defer the ruling and allow the transfer to go
21 forward.

22 Thank you, Your Honor.

1 THE COURT: All right. I'll take a look at
2 this and get you all an answer as quickly as I can.

3 MR. SPIVEY: Thank you, Your Honor.

4 MR. JORDAN: Thank you, Your Honor.

5 THE COURT: All right. We'll adjourn until
6 Monday morning at 9:30.

7 (Whereupon, the proceedings at 11:54 a.m.
8 were concluded.)
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1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

2 I, REBECCA MONROE, Court Reporter and
3 Notary Public in and for the Commonwealth of
4 Virginia at Large, and whose commission expires
5 August 31, 2021, do certify that the foregoing is a
6 true, correct, and full transcript of the
7 proceedings.

8 I further certify that I am neither related
9 to nor associated with any counsel or party to the
10 proceedings; nor otherwise interested in the event
11 thereof.

12 
13
14

15

16

Rebecca Monroe

17

Notary Public

18

Commonwealth of Virginia at Large

19

Notary No. 7243327

20

21

22

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